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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: AUG 26 2011 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a wholesaler of industrial hardware. It seeks to employ the beneficiary permanently in the United States as an administrator coordinator pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the job offered on the labor certification did not require a member of the professions holding an advanced degree or an alien of exceptional ability as indicated on the Form I-140, Immigrant Petition for Alien Worker. The director further concluded that the beneficiary did not possess an advanced degree or its equivalent. Finally, the director determined that the petitioner had not established its continuing ability to pay the proffered wage.

On appeal, the petitioner submits additional documentation relevant to the beneficiary's education and experience. The petitioner additionally submits additional evidence pertinent to the petitioner's ability to pay the proffered wage.

For the reasons discussed below, we find that the director's decision to deny the petition based on the determination that the job offered on the labor certification does not require an advanced degree professional or an alien of exceptional ability is supported by the plain language of the regulation at 8 C.F.R. § 204.5(k)(4), which is binding on us. We additionally find that the petitioner failed to establish that the beneficiary possessed the requisite equivalent of an advanced degree and that the petitioner failed to establish its continuing ability to pay the proffered wage.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).[1]

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who

[1]The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

> because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.**[2]

(Bold emphasis added.)

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In this matter, Part H, line 4, of the labor certification reflects that a bachelor's degree in psychology or commerce is the minimum level of education required. Part H.6 indicates that no experience in the job offered of administrative coordinator is required. H.7 indicates that alternate field of study acceptable is "Education." H.8 also reflects that the employer will accept an alternate combination of education and experience, which, according to H.8-A and H.8-C is a Master's degree and two years of experience. H.9 indicates that a foreign educational equivalent is acceptable. H.10 states that no experience in an alternate occupation is acceptable. As set forth in line 14, the employer additionally requires specific skills as follows:

> Able to compose simple business correspondence. Computer Literate---Excell, Word, Windows, Internet, Search Engine, Knowledge of Quickbook Software, E-Mail, Etc.

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[2]There is no indication in this case that the petitioner is requesting a visa based on the beneficiary as an alien of exceptional ability. Further, the ETA Form 9089 replaced the Form ETA 750 after new DOL regulations went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

the ETA Form 9089 is $24.15 per hour, which amounts to $50,232 per year. The ETA Form 9089 does not indicate that the beneficiary worked for the petitioner.[3]

As noted above, where experience is not a consideration, the minimum education is a U.S. degree above that of a baccalaureate or the foreign equivalent degree. The regulatory equivalency acceptable in lieu of a degree above that of a baccalaureate is a U.S. baccalaureate degree followed by at least five years of progressive experience in the specialty. Part H.4 of the labor certification submitted in this case states only that a baccalaureate degree in psychology or commerce and no experience is the primary requirement for the job offered.

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it

[3] On a Form G-325A, Biographic Information, signed by the beneficiary on March 3, 2010, she states that she has worked as an administrative coordinator for the petitioner from June 2008 to June 2009. On August 7, 2008, the petitioner submitted a response to the director's request for evidence but failed to mention that it employed the beneficiary and failed to submit any evidence of wages paid to the beneficiary.

adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[4] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

Thus, because the employer seeks to modify the regulatory bachelor's requirement and five years of experience and states that it will accept a bachelor's degree in psychology or commerce and no

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[4] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

experience, the position in this case does not require a member of the professions holding an advanced degree. The appeal will be dismissed on this basis.

Further, the AAO does not concur with the petitioner in finding that the beneficiary actually possesses an advanced degree because we find that the beneficiary's credentials fail to establish that she holds a four-year bachelor's of education, and does not have the foreign equivalent to a U.S. bachelor's degree in education.

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001).

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United

> States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

As indicated by the copies of the beneficiary's educational credentials contained in the record, she obtained a teacher's certificate in primary [redacted] in Honduras or "Maestra de Educacion Primaria," on November 21, 1996. In 2002, the beneficiary obtained a certificate of study from [redacted] indicating that she graduated as a middle school professor or "Profesor de Educacion Media." The copy of this credential does not indicate any specific date in 2002 when the beneficiary received this certificate.[5]

On appeal, the petitioner submits an evaluation, dated October 29, 2008, from [redacted], authored by [redacted] Ph.D. Dr. [redacted] determines that the beneficiary's academic study [redacted] is "substantially similar to the required course work leading to an Associate's degree from an accredited institution of higher learning in the United States." He also indicates that the beneficiary's course of study at the Universidad [redacted] Francisco Morazan represented the U.S. equivalent of "three and one half years of specialized courses in Education, as well as in other related subjects." Dr. [redacted] combines both of the beneficiary's separate programs of study and concludes that collectively, the beneficiary has the U.S. equivalent of a Bachelor's in Education. It is noted that he failed to state a specific date in 2002 that the beneficiary received her certification as a middle school teacher. Dr. [redacted] evaluation also fails to identify the sources upon which his conclusion is based.

As explained above, the AAO does not concur with this evaluation, and notes that even Dr. [redacted] does not state that the beneficiary's certification from the Universidad [redacted] Francisco Morazan represents a single four-year bachelor's degree to meet the terms of the certified labor certification. Neither program individually would be equivalent to the required foreign

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[5] It is noted that two of the English translations accompanying the beneficiary's educational certificates and transcripts stated that "under penalty of perjury that the foregoing translation is true and correct, from Spanish to English based on the official looking document in front of me." The third translation omitted the phrase "from Spanish to English." None of these translations comply with the terms of 8 C.F.R. § 103.2(b)(3):

> *Translations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

equivalent degree. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). It is noted that in *Foreign Educational Credentials Required* (Fifth Edition) published in 2003 by the American Association of Collegiate Registrars and Admissions Officers (AACRAO),[6] the beneficiary's "Maestra de Educacion Primaria" would only gain her admission as a freshman in a U.S. college or university and her "Profesor de Educacion Media (fewer than four years)" would be eligible only for undergraduate transfer (possible advanced credit). The predicate baccalaureate degree required to have the equivalent of an advanced degree must represent a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. With the addition of five years of progressive experience, a beneficiary may be deemed to qualify as an advanced degree professional. In this case, the beneficiary's Honduran credential as a Profesor de Educacion Media or middle school professor does not qualify as the required bachelor's degree to the terms of the certified labor certification, as it is not by itself a single degree that is the foreign equivalent of a U.S. baccalaureate degree.

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[6] According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in 28 countries." http://www.aacrao.org/about/. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* AACRAO's Electronic Database for Global Education (EDGE) is "a web-based resource for the evaluation of foreign educational credentials." http://aacraoedge.aacrao.org/register/. Authors for EDGE work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.

In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

It is noted that even if the beneficiary possessed the U.S. equivalent of a Bachelor's in Education, the record does not clearly establish that she has five years of progressive experience following a baccalaureate degree. It is noted that the regulation at 8 C.F.R. § 204.5(k) provides in relevant part:

> (3) *Initial Evidence.* The petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.
>
> (i) To show that he alien is a professional holding an advanced degree, the petition must be accompanied by:
>
> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post -baccalaureate experience in the specialty.

The regulation at 8 C.F.R. 204.5 additionally states in pertinent part:

> (g) *Initial Evidence*-(1) *General.* . . . Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

In this case, in response to the director's request for evidence, the petitioner provided an employment verification letter from Carrion, located in San Pedro Sula Honduras. The letter is

dated August 6, 2008 and is signed by [redacted]" The letter is in English. It states that the beneficiary worked for Carrion from "1997 to 2001 in the Department of Client Services." It vouched for her performance but failed to describe her duties and her job title. It is noted that the K of the ETA Form 9089 gives the beneficiary's dates of employment for the [redacted] Department Store as beginning February 1, 1998 to April 30, 2003. A second letter from [redacted] was submitted on appeal. This letter is dated November 12, 2008 and is signed by [redacted] President." The letter is in English. Mr. [redacted] states that the beneficiary was an administrative officer from February 1, 1998 to April 30, 2003. He describes her duties and states that her status was "regular." It is noted that no clarification has been offered to resolve the discrepant dates of employment given by this employer in each of the two letters written three months apart. Further, neither letter verifies that the beneficiary possesses the specific other computer skills required on H.14 of the labor certification. Additionally, neither letter indicates whether the beneficiary's employment was full-time or part-time, particularly given that she was a student during most of the claimed period of employment. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Finally, the regulation requires five years of progressive experience following the acquisition of a baccalaureate degree to be considered as equivalent to an advanced degree. Even if the beneficiary's certificate as a [redacted] was considered to be the U.S. equivalent of a baccalaureate degree, which as addressed above, it is not, without identifying the specific date in 2002 in which she acquired the credential, it is not possible to calculate whether the beneficiary had five years of progressive experience by the priority date of November 8, 2007.[7]

Because the beneficiary has neither (1) a U.S. baccalaureate degree or foreign equivalent degree followed by five years of progressive experience in the specialty nor (2) a U.S. master's degree or foreign equivalent degree followed by two years of experience, she does not qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act.

The evidence submitted does not establish that the ETA Form 9089 requires a professional holding an advanced degree or an alien of exceptional ability. Further, the record does not establish that the beneficiary possesses an advanced degree or its foreign equivalent.

With regard to the petitioner's continuing ability to pay the proffered wage, the regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be

[7] Additionally, as noted above, the labor certification failed to state the required regulatory alternative to a Master's degree of a bachelor's degree and five years of progressive experience.

> accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

As noted above, the petitioner must demonstrate the continuing ability to pay the proffered wage of $50,232 beginning on the priority date.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on January 1, 1975, to have a gross annual income of $20,000,000, and to currently employ 75 workers. According to the tax returns in the record, the petitioner's fiscal year runs from April 1st to March 31st of the following year. On the ETA Form 9089, signed by the beneficiary on March 21, 2008, the beneficiary did not claim to have worked for the petitioner, however, as noted above, in a subsequently signed document related to her application for advanced parole, she claims to have worked for the petitioner from June 2008 to June 2009.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage or any wages from the priority date of November 8, 2007. No evidence of compensation paid to the beneficiary has been submitted.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a

basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
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> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

On appeal, the petitioner has submitted a copy of its 2006 Form 1120, U.S. Corporation Income Tax Return. It indicates that the petitioner's fiscal year runs from April 1, 2006 to March 31, 2007. The

tax return reflects that the petitioner declared $483,124 in net income.[8] Besides net income, and as an alternative method to review a petitioner's ability to pay, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[9] It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Current assets are shown on line(s) 1 through 6 of Schedule L and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.[10] The petitioner's net current assets stated on its 2006 Form 1120 is $1,080,944.

It must be noted that the petitioner has never submitted any financial information covering the priority date of November 8, 2007 onward. The petitioner provided copies of reviewed financial statements as of March 31, 2007 and March 31, 2006 in response to the director's request for evidence. The director noted that as they were not audited, the petitioner had not provided the documentation required by the regulation at 8 C.F.R. § 204.5(g)(2). The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. They represent the

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[8]The petitioner is a C corporation. For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

[9] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[10] A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

unsupported representations of management and are not probative of the petitioner's ability to pay the proffered wage.

It is additionally noted that the petitioner states on appeal that the 2007 tax return will be submitted, but as of this date, this office has received nothing further. Therefore, as the record does not contain the petitioner's 2007 tax return, or any other evidence from the November 8, 2007 priority date onward, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, or its net income or net current assets.

In some cases, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability such as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, and the overall number of employees.

Although the petitioner appears to be a long-standing profitable operation, as noted above, however, the record contains no financial evidence that covers the priority date of November 8, 2007 onward. In this context, we cannot conclude that the petitioner has established that it had the *continuing* ability to pay the proffered wage as of the priority date.

Therefore, the petitioner has not demonstrated that the job offered on the labor certification requires a member of the professions holding an advanced degree or an alien of exceptional ability as indicated on the Form I-140, Immigrant Petition for Alien Worker or that the beneficiary possessed such an advanced degree or its equivalent, or that it has established its continuing ability to pay the proffered wage from the priority date onward.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.